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The "Repsol Case" Against Argentina: Lessons for Investment Protection Policy

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Are Bilateral Investment Treaties (BITs) fit for purpose – to help resolving disputes between investors and states in an efficient, fair and non-politicised manner? One of the bigger cases in the past years – involving the expropriation by the Argentinean government of Repsol's majority stake in energy firm YPF – has now been settled. And the case offers several lessons for Europe and others that want the system of international investment arbitration to improve. Challenged by groups and parties that want to end or substantially reduce the right for investors to bring cases against states – generally or only in the case of the Transatlantic Trade and Investment Partnership (TTIP) – the EU now reviews its investment protection policy. While reforms are called for, they should improve and not erode the basic principles of BITs.

Two years ago, the Argentinean government fast-pedalled a bill to allow for the nationalisation of the shares in energy firm YPF owned by Repsol. The government expropriated Repsol's assets and denied the company compensation. Now a settlement has been agreed between Repsol and Argentina – and under this agreement Repsol will receive compensation while both parties agree to end the litigation around Repsol's previous majority stake in YPF and Argentina's expropriation.

The "Repsol case" is in some ways typical for the body of BIT cases that has been arbitrated in international tribunals. It concerned a sector, energy, and a country, Argentina, that both represent a disproportionate number of the past disputes. Like many other arbitration cases, it was settled before a tribunal had ruled on the dispute. But the case was in other ways different.

First, the amount concerned was higher than usual in arbitration cases. The value of Repsol's shares was not only substantial but also likely to increase as YPF was sitting on shale reserves in Vaca Muerta, the shale-rich field in Patagonia that was discovered shortly before the nationalisation. Second, Repsol's shares in YPF (and only Repsol's assets, not shares held by others) were confiscated. The government offered no compensation to Repsol and rather invented a story about alleged mismanagement of the firm to justify the uncompensated nationalisation.

Third, the nationalisation followed a pattern of a general drive towards economic nationalism in Argentina. It was not an isolated example of disrespecting rules of international commerce. In the past years, Argentina has increasingly deployed protectionist measures and found itself in conflicts with other countries and organisations like the International Monetary Fund because of its refusal to follow agreed international economic rules.

While in some instances unique, the "Repsol case" is also a harbinger of future problems in the field of investment. While disputes usually occur in selected sectors – many of which are under heavy influence of political decisions or patronage – there is an increasing number of cases that involve very big values. As the

trend of progressive reforms to open up countries to commerce and subject them to rules have stalled in the past years, and in some instances been reverted, the world is moving into an age where political interference in matters of foreign investments is likely to grow.

There are several lessons from the "Repsol case" that offer guidance to Europe and others that ponder changes to investment-protection policy. First, a BIT with clear provisions on investor-state dispute settlement is often (but not always) a prerequisite to resolve disputes. Without such treaties, companies – and their host governments – have to resort to other means, usually political means, of dispute resolution. The alternative to dispute resolution under a BIT can be legal recourse through national courts, but that is often not an option if we consider the body of BIT cases that has been arbitrated. The "Repsol case" is a good example of the value of BIT arbitration when local courts simply cannot be used. In this case, the investor could immediately after the confiscation begin to focus on a legal structure to resolve the disputes. As the politics around the dispute soured, the existence of a BIT proceeding offered both parties a structured way to arbitrate a resolution.

Second, the political anchor of BITs gets important when expropriations or other actions by governments that clearly violate an agreement on investment protection are not isolated examples of gross government misbehaviour. Such behaviour tends to follow a pattern – a pattern that reflects general policy in a country or a pattern that rather reflects behaviour within a sector. For European firms, the chances to get effective dispute resolution have improved by moving policy competence to Brussels. While still in a formative phase, it certainly will be helpful to European investors faced with intentional discrimination or unfair practices that policy is anchored in a larger economic context. The point here is not that he EU should deploy economic sanctions against another government, but that the political and economic cost of misbehaving can be radically higher when a country violates a treaty with the EU rather than an individual EU country. The lesson from the "Repsol case", which was brought under a BIT between Spain and Argentina, is that the EU reaction reinforced the significance of the Argentina's misbehaviour and displayed the thickness of the full economic relation between Argentina and Europe. The political and economic costs to Argentina of not seeking an arbitrated resolution grew.

Third, while there are in some sectors a solidarity between offended firms – an unwritten principle that a company should not act to get benefits when a rival firm is faced with gross misbehaviour by a government – the "Repsol case" also showed that there are companies that stand ready to feed on the corps of other companies. In this case, the government in Argentina agreed with a rival firm about tentative investments to explore a field that was part of the Repsol asset that got confiscated. Such behaviour is corrosive for the integrity of investment-protection rules – and should be an area for reform in future BITs, predominantly by giving greater clarity to what restrictions that should apply for the monetisation of expropriated assets while they are under dispute.

Fourth, it is necessary to begin a process of updating many of the BITs. There is now a proposal to open up dispute resolutions to greater transparency. That would be helpful – and the lesson from the "Repsol case" is that investors bringing complaints have much to gain from greater outside scrutiny. Moreover, it is also necessary to change current BIT rules in order to speed up processes and allow for faster resolution proceedings when an investor and a government cannot come to an agreement. Justice delayed is justice denied. And there are far too many countries that intentionally delay cases in order to avoid paying the awards.